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In the Supreme Court of the United States

OCTOBER TERM, 1994

TOM L. RAGLAND,
Petitioner,

versus

ALAN MINTER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

Whether, in Texas, where a finding that a suit is filed in *bad faith* is *requisite* to the taking of an attorney's property through a monetary sanction, and an evidentiary hearing is actually held *on such issue,* wherein the undisputed evidence shows a *good faith* filing, is the action of an Appellate Court in upholding such a taking *solely* on the basis that *affidavits* bearing on an *entirely different issue* were merely on file in the clerk's office, a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, if said attorney had *no notice* prior to nor even during said actual evidentiary hearing that such affidavits were to be considered on said issue of sanctions?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TOM L. RAGLAND,
Petitioner,

versus

ALAN MINTER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
THIRD DISTRICT OF TEXAS

The Petitioner, Tom L. Ragland, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals, Third District of Texas, rendered in these proceedings on August 25, 1993.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals, Third District of Texas, appears at Appendix A. The orders of the Texas Supreme Court denying petitioners application for writ of error and overruling his motion for rehearing in said cause appear at Appendix B.

JURISDICTION

The judgment of the Court of Appeals, Third District of Texas, was rendered on August 25, 1993, which appears at Appendix A. The Order overrulling Petitioners' duly filed motion for rehearing of his petition for writ of error in said cause was rendered on April 6, 1994. Said Court of Appeals is the highest Texas Court to which Petitioner can appeal the decision of the trial court as a matter of right. The only higher review that may be had under Texas law is by the *discretionary* grant by the Texas Supreme Court of a writ of error.

Jurisdiction to review by writ of certiorari is conferred on this Court by 28 U.S.C.A. 1257.

CONSTITUTION PROVISIONS, STATUTES AND RULES INVOLVED

Amendment 14 to the Constitution of the United States.

> "Section One. . . . ' nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF FACTS

Petitioner, as counsel for Margie Morris, Plaintiff, filed suit against Respondent, Minter, alleging that Pivot Mini Storage and others, acting through its duly authorized agents and attorneys in a purported foreclosure of a statutory storage lien, seized and sold at a public auction over $45,000.00 worth of Plaintiff's personal possessions to satisfy a debt of $618.00 in purported delinquent rent, and

that it denied Petitioner her right to redeem and various other legal rights pertaining to said seizure and sale.

Said suit further alleged that Respondent, Minter, Pivot, and others acting in combination with each other combined to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means, that they acted as the actual or implied agent for the other in said seizure and sale at all times relevant, that said Minter acted as legal advisor to the other Defendants, and advised, formulated and implemented rules, policies and procedures for said Pivot intended to wrongfully deprive Plaintiff and other citizens similarly situated of possession and legal title to personal property stored in facilities similar to those operated by Pivot, and that the acts and conduct of Minter were intentional, deliberate and done by him for monetary gain.

Motion for summary judgment filed by Minter was granted. Thereafter, Minter filed a motion for the imposition of monetary sanctions against Petitioner, the attorney for the Plaintiff in said suit, upon the ground that the allegations in his pleading as to Minter were groundless and *brought in bad faith.* A hearing was set and had on said motion to impose monetary sanctions against petitioner Ragland, attorney for Plaintiff, at which hearing the only evidence offered was the testimony of Petitoner Ragland. Ragland testified without dispute that at the time his complained of pleading was filed against Minter he had the deposition of Defendant Priesmeyer, Minter's client, in which Priesmeyer testified unequivocally that everything that was done in connection with the sale of Margie Morris's property was done at the direction and instruction of

Minter; that the defendants were acting on Minter's instructions and that when the Defendants had the sale in question they were following Minter's advice from day one. The Trial Court found that *at the time of the filing* of Plaintiff's petition the allegations against Minter were groundless and alleged in bad faith and imposed monetary sanctions against petitioner in the amount of $13,200.00. Though the record is bare of any indication the trial court considered any affidavits filed in support of Minter's prior motion for summary judgment, no notice was ever given to Petitioner that such were to be considered and the issue of Petitioner's good or bad faith *at the time of the filing* of Plaintiff's petition was not even an issue in the prior motion for summary judgment, the Court of Appeals upheld the monetary sanctions *solely* upon said *unoffered* and theretofore *unmentioned* prior summary judgment affidavits.

REASONS FOR GRANTING WRIT

THE STATE COURT OF LAST RESORT IN TEXAS HAS DECIDED A CRUCIAL QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND HAS DECIDED A FEDERAL CONSTITUTIONAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE PRINCIPLES OF LAW PRONOUNCED BY THIS COURT AND A UNITED STATES COURT OF APPEALS

The State of Texas, on the theory of protecting its courts from groundless suits *brought in bad faith,* has

deprived Petitioner of his property in violation of the due process clause of the Fourteenth Amendment to the United States Constitution. Due to the grave danger of chilling an attorneys creativity and advancement of innovative theories that bring about vital and positive changes in our law, this Court should, *for the first time,* pronounce as clearly as possible what process is due an attorney when his property is taken upon the basis of such an accusation.

Though a violation of Rule 11 *Federal R.C.P.* is established solely by a showing that a suit is groundless, for a violation of Rule 13 *Texas R.C.P.* it must be shown that the suit is groundless *and brought in bad faith* or groundless and *brought for the purpose of harassment.* Thus, under Texas law, the issue on a motion for summary judgment does not present the issue most crucial to imposition of sanctions against an attorney, the issue of the attorney's bad faith *at the time of the filing of the suit.* It is now axiomatic that imposition of monetary sanctions against an attorney for his filing of a suit is subject to the due process clause of the Fourteenth Amendment to the Constitution of the United States. *Donaldson v. Clark,* 819 F.2d 1551 (11th Cir. 1987) (en banc), *Jones v. Pittsburgh Nat. Corp.,* 899 F.2d 1350 (3rd Cir. 1990). Equally settled is the principle that such due process requires a fair opportunity to respond to the issue raised and object to the evidence to be considered on said issue. *Cleveland Bd. of Educ. v. Loudermill,* 105 S.Ct. 1488, 1496 (1985), *Donaldson v. Clark,* supra, *Eguia v. Tompkins,* 756 F.2d 1130, 1139 (5th Cir. 1985), *1488 Inc. v. Philsec Inv. Corp.,* 939 F.2d 1281 (5th Cir. 1991), *White v. General Motors Corp. Inc.,* 908 F.2d 675 (10th Cir. 1990).

Though in some instances, it might not be necessary to conduct as evidentiary hearing on the issue of an attorney's bad faith, if an evidentiary hearing is *actually conducted,* then, an attorney is entitled to know, object to and respond to any evidence that is considered by the trier of fact on such issue. *Donaldson v. Clark,* supra, *Jones v. Pittsburg Nat. Corp.,* supra. Where there is no evidentiary hearing but only the presentation of affidavits, the affidavits are decisive, but *where an evidentiary hearing is actually had* on an issue, unadmitted affidavits, though uncontroverted, cannot be decisive. *Revia v. State,* 649 S.W.2d 625 (Tex. Crim. App. 1983). The case of *Donaldson v. Clark,* supra, is also precisely in point. In said case, affidavits filed in support of a motion to dismiss were used to support the grant of a summary judgment without any notice to opposing counsel of intent to use same on a motion for sanctions. Since said affidavits had been filed in regard to a *different issue* than that of a summary judgment or sanctions, the Eleventh Circuit, en banc, held that the failure to give notice and an opportuntiy to respond to the affidavits that were *used to support* the converted motion for summary judgment as to the separate issue of sanctions was fatal to consideration of the affidavits in support of sanctions. Here, an evidentiary hearing was held on the crucial issue of bad faith of the attorney long after a summary judgment had been rendered and the only evidence at the hearing was the testimony of attorney Ragland that, *at the time of filing* the suit against Defendant Minter, he based same upon the deposition testimony of the manager of the business in question that the wrongs committed against Margie Morris were in exact accord with the instructions given to the business by Defendant Minter. The Texas Court of Appeals held that *though such*

evidence was undisputed, the prior summary judgment evidence was sufficient to, and did, support the trial Judge's taking of Petitoner's property. Such holding was made despite the fact that no reference was ever made in the motion or at the hearing for sanctions that said summary judgment affidavits should or were to be considered on the issue of sanctions. Every rule in both Federal and State jurisdictions require at least 10 days notice of affidavits and other proposed evidence in support of any motion for summary judgment. Should there be no requirement of any notice of an intent to use ex parte affidavits in support of a proceeding as serious as the taking of an attorney's property for his filing of a lawsuit? The first knowledge attorney Ragland had that said ex parte affidavits were intended to be used to contradict his sworn testimony at the hearing was after the decision was published by the Texas Court of Appeals many, many months after the sanction hearing.

CONCLUSION

For said reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, Third District of Texas, and petitioner accordingly so prays.

Respectfully submitted:

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CERTIFICATE

I hereby certify that 3 true copies of the foregoing Petitioner for Writ of Certiorari have been duly mailed to counsel for the Respondent, William R. Allensworth, 600 Congress Avenue, 1600 One American Center, Austin, Texas 78701.

W. V. DUNNAM, JR.

APPENDIX A

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

ON MOTION FOR REHEARING

No. 3-92-250-CV

MARGIE MORRIS,,

APPELLANT

vs.

ALAN H. MINTER,

APPELLEE

No. 3-92-382-CV

MARGIE MORRIS AND TOM L. RAGLAND,

APPELLANTS

vs.

ALAN H. MINTER,

APPELLEE

A-2

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
147TH JUDICIAL DISTRICT

NOS. 475,697-B & 475,697-D,

HONORABLE P. SCOTT McCOWN & HONORABLE
PAUL R. DAVIS, JR., JUDGES PRESIDING

The opinion in cause numbers 3-92-250-CV, Margie Morris appeals from a summary jmudgment that she take nothing in her suit for damages against Alan Minter. We will affirm the judgment. In cause number 3-92-382-CV, Morris and her attorney, Tom L. Ragland, appeal from a trial court order imposing money sanctions against them at Minter's request. We will modify the order and affirm it as modified.

THE CONTROVERSEY

Morris stored articles of personal property in Pivot Storage, a self-storage facility. When she failed to pay the rent, Pivot sold the personal property to satisfy its lien. Morris sued Privot and others on various claims. In the course of the suit, Morris took the deposition of Minter, Pivot's attorney, and then joined him as a defendant, alleging against him causes of action for civil conspiracy, conversion, negligence, and gross negligence. Minter moved for and obtained summary judgment that Morris take nothing by her claims against him. The trial court severed Morris's claim's against Minster from those against other defendants. Morris appeals, in cause number 3-92-250-CV,

from the summary judgment.

Minter moved also for sanctions against Morris and her attorney, Tom L. Ragland, based on Minter's allegations that the actions pleaded against him violated Texas Rule of Civil Procedure 13 and entitled him to the sanctions authorized by that rule. *See* Tex. R. Civ. P. 13. The trial court assessed money sanctions against Morris and Ragland, jointly and severally, and severed the order from the balance of the suit. Morris and Ragland appeal in cause number 3-92-382-CV.

The two appeals were consolidated for oral argument; we will discuss each separately in the paragraphs that follow.

THE SUMMARY JUDGMENT

Minter moved for summary judgment on the following grounds: (1) he did not participate in any decision to sell Morris's property; (2) he was unaware of that sale; (3) he never exercised dominion or control over Morris's property; and (4) he owed Morris no duty of care upon which an action could be founded. He supported his motion by reference to his attached affidavit, his own deposition, and the deposition of Janet Mayhew, Pivot's manager, Tex. R. Civ. P. 166a. Morris assails the summary judgment by various points of error.

In point of error one, Morris contends (1) Minter's knowledge of the sale was not essential for her to prevail on her conspiracy claim; and (2) Minter's supporting affidavit did not justify the summary judgment because he is an in-

terested witness.

In his affidavit, Minter stated he had not advised Pivot with regard to the sale of Morris's property and had no knowledge of it. Janet Mayhew corroborated these statements in her deposition. Edwin Priesmeyer, another defendant and a partner in Pivot, stated in his affidavit, however, "When we had that sale, we were following [Minter's] advice." Morris argues that Priesmeyer's contrary statement created a "fact issue" precluding summary judgment. Minter argues that Priesmeyer's statement could refer to other occasions when Minter acted as Pivot's attorney in similar circumstances or, possibly, to speeches that Minter had given at seminars involving the conduct of storage-lien sales. We hold there is no material fact issue created by the apparent conflict between the two statements.

A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1969). "There must be an *agreement or understanding* betweem the conspirators to *inflict* a wrong against . . . another, a meeting of minds on the object or course of action, and some mental action coupled with an intent to commit the act which results in injury . . . ." *Id.* at 857 (quoting 15A C.J.S. *Conspiracy* § 2, at 600 (1967)) (emphasis added). If we assume Minter knew of the *sale* and advised Pivot in *that* regard, this does not necessarily mean that Minter knew that the sale was *for the purpose* of inflicting a wrong against Morris or that he acted toward that end in an agreement or understanding

with others. Indeed, Minter specifically denied as much in his affidavit when he stated, "At no time did I ever exercise dominion and control over the Morris property, nor did I intend to commit theft, conspire with anyone to damage [Morris], or convert [Morris's] property." "To be liable as a conspirator a person must have participated *intentionally* in the conspiracy *with a view* to the furtherance of the common design." 15A C.J.S. *Conspiracy* § 17, at 651-52 (1967) (emphasis added). Stated another way, the summary-judgment record shows without dispute that Minter did not share with anyone an unlawful intent to perpetrate a wrong against Morris, even if he knew of the sale and advised Pivot about it. *See Swirzer v. Joseph,* 442 S.W.2d 845, 848 (Tex. Civ. App.—Austin 1969, no writ). Knowledge of the *sale* is not the same thing as knowledge of an *agreement to inflict a wrong* against another by means of the sale. *Schlumberger,* 435 S.W.2d at 857.

Under her first point of error, Morris also assails the sufficiency of Minter's affidavit on the ground that he is an interested party. The summary-judgment rule permits the granting of summary judgment on the basis of an interested witness's affidavit if the matters stated therein can be "readily controverted" or countered by opposing "evidence." Tex. R. Civ. P. 166a(c); *Casso v. Brand,* 776 S.W.2d 551, 558 (Tex. 1989).

Morris refers to the statements in Minter's affidavit that he had not advised Pivot with regard to the sale and had not known of the sale until after it had taken place. These were factual matters open to attack by appropriate documentation or opposing statements in depositions or affidavits if Morris had any evidence that Minter's state-

ments were untrue. More importantly, however, we believe the issue immaterial for the reasons stated above. We overrule Morris's first point of error and hold that Minter was entitled to summary judgment on Morris's cause of action for conspiracy.

We hold as well that the trial court properly granted summary judgment on Morris's cause of action for conversion. To recover on such a cause of action, it would be necessary for Morris to establish that Minter acted with an intent wrongfully to exercise dominion and control over Morris's property. *See Fox v. American Propane, Inc.*, 508 S.W.2d 426, 428 (Tex. Civ. App.—Austin 1974, writ ref'd n.r.e.). The summary-judgment record negates the essential element of intent insofar as Minter is concerned. We overrule Morris's second point of error.

In her points of error four and five, Morris contends that "fact issues" precluded summary judgment on her negligence claim against Minter. She argues that her negligence claim rests upon a common-law duty that Minter owed her, which he breached by the procedures he established for Pivot to follow in enforcing its storage liens.

The record established as a matter of law that Morris was not Minter's client. We hold that Minter's duty of ordinary care, in his advice to Pivot, was a duty owed to Pivot exclusively. *See, e.g., Wavell v. Roberts,* 818 S.W.2d 462, 465 (Tex. App.—Corpus Christi 1991, writ denied); *see generally,* John Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties,* 61 A.L.R.4th 615 (1988). We therefore overrule points of error four and five.

In her eighth point of error, Morris complains the trial court erred in refusing to rule on her objections to Minter's summary-judgment affidavit, which had the effect of preventing Morris from making a complete presentation of her case to this Court. The record reveals that Morris, contemporaneously with filing her response to Minter's motion for summary judgment and accompanying affidavit, filed a pleading styled "Plaintiff's Objections and Exceptions to Minter's Summary Judgment Affidavit and Attachments." In this pleading, Morris raised ten objections or exceptions to parts of Minter's affidavit; in addition, she requested that the trial court conduct a hearing thereon and strike all improper or inadmissible parts of the affidavit. Seven days later, Morris filed a motion requesting that the trial court rule on her objections and exceptions before hearing Minter's motion for summary judgment. The parties agree that the trial judge declined to rule expressly on Minter's objections and exceptions.

We hold any error was harmless, if error there was. Apparently, the trial court's inaction did not preclude Morris from arguing in this Court that summary judgment was erroneous because of some defect in Minter's affidavit. The issue before this Court and the issue in the trial court are the same: does the summary-judgment record justify judgment as a matter of law? *See* Tex. R. Civ. P. 166a. This issue includes the sub-issue of whether any affidavits should be denied legal effect in the summary-judgment decision because they fail to comply with subsection (f) of Rule 166a. We have independently reviewed each of the ten complaints Morris directed at Minter's affidavit. We find them to be without merit in this regard: had the trial court sustained any of them, the action would not have precluded

judgment as a matter of law on Minter's motion. We therefore overrule Morris's eighth point of error.

Because of our decision on the preceding points of error, it is not necessary that we address Morris's remaining points of error.

SANCTIONS

Minter moved that the trial court impose sanctions against Morris and her attorney, alleging they had brought a groundless claim against Minter in bad faith or for the purpose of harassment. Tex. R. Civ. P. 13. "Groundless" is defined as "having no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." *Id.* If a trial court finds a claim is brought in bad faith, it may for good cause impose sanctions available under Texas Rule of Civil Procedure 215-2b. *Id.* The scope of appellate review in such cases is whether the trial court abused its discretion. *Home Owners Funding Corp. v. Scheppler,* 815 S.W.2d 884, 889 (Tex. App.—Corpus Christi 1991, no writ).

After an evidentiary hearing, the trial court imposed against Morris and her attorney a sanction in the amount of $13,200, a sum equal to Minter's attorney's fees in the cause. The sanction order declares the trial court's conclusions of law: (1) the claims alleged against Minter in Morris's third amended original petition, which added Minter as a defendant in the cause, were groundless and brought in bad faith; (2) when the petition was filed, no basis in law or fact existed for the claims against Minter, thus establishing good cause for imposing the sanction.

Findings of fact and conclusions of law filed by the trial court augmented these conclusions.

In their first point of error, Morris and her attorney contend the trail court mistakenly placed upon them the burden of proof, as evidenced by the trial court's request that they explain their reasonable basis for adding Minter as a defendant. We overrule the point because the face of the order reveals that the trial court did not misplace the burden of proof. The relief ordered rests on the trial court's *affirmative* conclusions from the evidence recited above. Moreover, as we understand the statement of facts, the trial court merely invited Morris and her attorney to explain their positions in light of the evidence previously adduced by Minter's counsel.

In their twelfth point of error, Morris and her attorney attack the trial court's finding of fact that Minter did not provide any legal advice, in connection with the sale of Morris's property, as being based upon evidence not properly before the trial court. This sanction proceeding, although presently severed from the summary-judgment proceeding, was a direct result of the latter. As such, the file before the trial court in this proceeding contained the summary-judgment motion, response, and supporting "evidence." The summary-judgment "evidence" duplicates, in part, deposition excerpts the trial court received in evidence at the sanction hearing. These excerpts were later stricken by this Court based on a motion by Morris and her attorney that the deposition transcripts had not been properly served on opposing counsel and offered into "evidence" at the sanction hearing. However, the same excerpts, save for two pages. are part of the summary-judg-

ment record as sworn attachments to the summary-judgment motion and response.

In reviewing the imposition of sanctions, an appellate court is not limited to the evidence that supports the trial court's findings; rather, the court "make[s] an independent inquiry of the entire record to determine if the court abused its discretion in imposing the sanction." *U.S. Fidelity & Guar. Co. v. Rossa*, 830 S.W.2d 668, 672 (Tex. App.—Waco 1992, writ denied). Although our review of the record in this cause may not include examination of the "evidence" that this Court has stricken, we may consider any evidence that was before the trial court, written discovery on file, arguments of counsel, and the circumstances surrounding the alleged sanctionable act. *See id.* Therefore, to the extent that the same "evidence" as that which was stricken is included within the record in a form not previously objected to, it is properly before us for consideration in determining if the trial court abused its discretion.

With this in mind, we look to the record to determine if the trial court's finding was supported by evidence in the record that was before the trial court. We presume that a trial court is familiar with the entire record of a case up to and including the motion under consideration. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986). The record contained the same "evidence" we discussed above in relation to the summary judgment, which conclusively established, we believe, that Morris was not in an attorney-client relationship with Minter. We overrule point of error twelve.

In point of error twenty-four, Morris and her attorney contend the trial court did not indicate, with the particularity required by Rule 13, its reasons for imposing sanctions. In support of this contention, appellants rely on *Zarsky v. Zurich Management Inc.*, 829 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1992, no writ), in which an appellate court found a trial-court sanction order, stating that the lawsuit was frivolous and without merit, insufficiently particular to meet Rule 13's requirement. In this cause, however, unlike *Zarsky*, the trial court listed in its extensive findings of fact and conclusions of law its specific reasons for imposing santions. We hold these are sufficiently particular to apprise an appellant of the conduct involved, present findings for appellate review, and meet the requirements of rule 13. *See Cloughly v. NBC Bank-Seguin, N.A.*, 773 S.W.2d 652, 656-57 (Tex. App.—San Antonio 1989, writ denied); *Powers v. Palacios,* 771 S.W.2d 716, 719 (Tex. App.—Corpus Christi 1989, writ denied.) We overrule point of error twenty-four.

In point of error twenty-one, Morris and her attorney contend the trial court erred in adopting Texas Disciplinary Rule of Professional Conduct 3.01 as the standard for imposing sanctions. They base this contention on the fact that, at the close of the sanction hearing, the trial court read into the record the disciplinary rule and selected comments from it. However, the court then went on to discuss Rule 13 and 215-2b and recent case law on sanctions. Furthermore, in its findings of fact and conclusions of law, the trial court expressly based its statements on Rules 13 and 215-2b without mention or reference to the disciplinary rules. Because we find no indication that the trial court relied upon an improper factor in imposing sanctions, we overrule point of error twenty-one.

In points of error twenty-two and twenty-three, Morris and her attorney argue that Rule 13 violates Tex. Const. art. I, § 19 and U.S. Const. amends. V, XIV, in that it fails adequately to apprise attorneys and clients of the meaning of "bad faith" and "harassment." Because appellants did not raise this complaint in the trial court, it is waived on appeal unless the error is "fundamental." Fundamental error occurs in civil matters only in limited circumstances, such as when the public interest is directly and adversely affected or the record indicates on its face the trial court was without subject-matter jurisdiction. *Smiley v. Johnson*, 763 S.W.2d 1, 4 (Tex.App.—Dallas 1988, writ denied); *see also 5 Texas Civil Practice* § 28.8, at 180 (Diane M. Allen et al. eds., 1992 ed.). Because these factors are not involved here, the points of error are not properly before this Court and, accordingly, are overruled.

In points of error three through five, Morris and her attorney contend there is no evidence or insufficient evidence to support the trial court's findings of fact that pertain to Minter's lack of involvement in the underlying suit and the reasons he was made a defendant therein.

The summary-judgment record, as we mentioned above, established as a matter of law that Minter was not aware of Morris's property, was not involved in the sale of Morris's property, and provided no legal advice in connection with the sale of Morris's property. The record further established as a matter of law that Minter did not provide legal advice to Morris and was never in an attorney-client relationship with Morris. At the sanction hearing, Morris's attorney conceded no case law supported the negligence claim against Minter and the attorney was not contending

for new law in that regard. Accordingly, we conclude the evidence is legally and factually sufficient to support the trial court's findings. We overrule points of error three through five.

In points of error six through eight, Morris and her attorney assail the legal and factual sufficiency of the evidence supporting the trial court's conclusions of law that the claims against Minter were groundless and made without reasonable inquiry into the facts and law. They incorrectly refer to these conclusions as findings. Because Morris and her attorney properly attack these same "findings" as conclusions in the points of error we discuss next, we will consider them with those points of error.

Morris and her attorney contend, in points of error thirteen through twenty, that the trial court erred as a matter of law in its conclusions of law that (1) Minter did not provide legal advice to Morris; (2) the claims were groundless, brought in bad faith, and for the purpose of harassment; (3) good cause existed to impose sanctions; (4) Morris's attorney violated Rule 13 by signing the plaintiff's third amended original petition; (5) there was no basis in law or fact for the claims, which were filed without reasonable inquiry; and (6) the foreclosure was the basis for Morris's claim.

Morris and her attorney argue primarily that the trial court considered improper evidence and erroneously placed upon them the burden of proof.[1] To the extent we

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[1] The trial court stated that in making its ruling, it took into account the deposition excerpts of Minter, Priesmeyer, and Mayhew. We again note that the major, relevant portions of these excerpts, although not

have addressed these arguments above, we need not repeat our previous comments.

An appellate court reviews legal conclusions, drawn from facts found by the trial court, to determine their correctness in light of the record. The appellate court must, however, sustain the judgment if the legal conclusions can be sustained on any legal theory supported by the evidence. *Nelkin v. Panzer,* 833 S.W.2d 267,268 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.). We believe, based on the record, that the trial court could reasonably conclude that the claims against Minter were groundless and brought in bad faith or for purposes of harassment because the record shows that Morris's attorney did not make a reasonable inquiry *that revealed any factual and legal grounds for liability on Minter's part. See* Tex. R. Civ. P. 13. Accordingly, we overrule points of error six through eight and thirteen through twenty.

In points of error nine and ten, Morris and her attorney attack the $22,200 in attorney's fees awarded as sanctions. Specifically, they contend there was no evidence or insufficient evidence that the fees were necessary or reasonable. In point of error eleven, they contend the contingent portion ($9,000) of the $22,200 sanction, conditioned upon their taking unsuccessful appeals, is not authorized by Rule 13 or Rule 215-2b and is within the exclusive jurisdiction of the appellate court under Tex. R. App. P. 84.

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footnote 1 continued.

properly introduced at the sanction hearing and, therefore, stricken by this Court as "evidence," were attached to the summary-judgment motion and response in the record before the trial court.

When attorney's fees are assessed as sanctions, proof of the necessity and reasonableness of the fees is not required. *Glass v. Glass,* 826 S.W.2d 683, 688 (Tex. App.—Texarkana 1992,) writ denied). Nonetheless, Minter's counsel provided detailed testimony that Minter had incurred fees of $13,200 in defending the suit filed against him and an additional $4,400 in preparation for the sanction proceeding. Minter's counsel further testified that if the appellants appealed to the court of appeals and, ultimately, the Supreme Court of Texas, Minter would incur an additional $9,000 attorney's fees.

The trial court, in awarding the monetary sanction,excluded the amount expended on the sanction proceeding and awarded attorney's fees of $13,200. The trial court added $9,000 more as sanctions, contingent upon the appellants taking unsuccessful appeals.

As to the $13,200 award, we find no abuse of discretion by the trial court; the court could reasonably conclude the award is not excessive based on the evidence and bears a reasonable relationship to the harm done. *See Trans-American Natural Gas v. Powell,* 811 S.W.2d 913, 917 (Tex. 1991).

The $9,000 award contingent upon appeal of the sanction order, however, cannot stand. On rehearing, Minter argues, based on the Civil Practice Remedies Code section 38.004, it was within the trial court's power to set a conditional fee award. We note, however, the Civil Practice and Remedies Code provides for attorney's fees, in additon to the amount of the valid claim, *if* the claim is of the types listed in the Code. *See* Tex. Civ. Prac. & Rem. Code

§ 38.001 (West 1986). Rule 13 sanctions do not fall within the list. Cases in which Texas courts have held that an award of provisional attorney's fees in the event of appeal is left to the trial court's discretion differ factually from the cause before us, in which the trial court awarded attorney's fees as a sanction. *See, e.g., Lyons v. Montgomery,* 701 S.W.2d 641, 643-44 (Tex. 1985) (upholding jury verdict for attorney's fees contingent on appeal of judgment in breach of contract suit); *Pullman v. Brill, Brooks, Powell & Yount,* 766 S.W.2d 527, 530 (Tex.App.—Houston [14th Dist.] 1988, no writ) (upholding jury verdict for attorney's fees contingent on appeal of judgment for legal fees).

Further, we believe it an abuse of discretion for a trial court to structure a sanction order in such a manner that a party automatically risks incurring additional sanctions if the party wishes to appeal the trial court's imposition of the original sanction. Under the Texas rules, whether sanctions are warranted on appeal is a matter properly left to the appellate court's determination; unless a record establishes that, at the time the appeal was perfected, the appellant had no reasonble grounds to believe the judgment would be reversed, the appellant should not be penalized for exercising the right of appeal. *See* Tex. R. App. P. 84; *In re Kidd,* 812 S.W.2d 356, 360 (Tex. App.—Amarillo 1991, writ denied). We therefore overrule appellants' points of error nine and ten as to the $13,200 award but sustain them as to the contingent $9,000 award. We sustain point of error eleven.

In their second point of error, Morris and her attorney contend the evidence was legally and factually insufficient to support the imposition of sanctions against

Morris. We agree.

There is no evidence in the record of any wrongdoing by Morris; all of the alleged wrongdoing is that of her counsel. Minter argues, however, that Morris has waived any complaint about the trial court's imposition of sanctions against her because she failed to raise the complaint in the trial court. *See Powers,* 771 S.W.2d at 718. We do not agree.

In the findings of fact and conclusions of law filed by the trial court, the court concluded good cause existed to impose sanctions against both Morris and her attorney, yet the court made no express finding of any specific act by Morris to support the conclusion. The only findings the court made regarding Morris relate to her attorney's actions in her behalf. *See Glass,* 826 S.W.2d at 687. Morris should not be punished for her counsel's actions unless she is implicated apart from having entrusted her legal representation to counsel. *See TransAmerican,* 811 S.W.2d at 917. Here, as in *Glass,* the punishment is for counsel's action in filing a pleading in violation of Rule 13.

The trial court's judgment must conform to the trial court's findings of fact. *Wirth, Ltd. v. Panhandle Pipe & Steel,* 580 S.W.2d 58, 62 (Tex. Civ. App.—Tyler 1979, no writ). When the findings do not support a judgment, the judgment should be reformed to conform to the findings or it should be reversed. 6 *Texas Civil Practice* § 18.14, at 405 (Diane M. Allen et al. eds., 1992 ed.). In this instance, the findings do not support the imposition of sanctions against Morris, nor is there sufficient, evidence in the record to support such a finding. The record reflects no evidence that

Morris did anything except rely on her counsel's advice, and the imposition of sanctions against her under these circumstances is unjust. *See Glass,* 826 S.W.2d at 687-88. Accordingly, we sustain point of error two.

COSTS

On rehearing, Minter argues the judgment of this Court improperly assessed half the court costs against him. He contends, in light of our disposition of the points of error, costs should be taxed against the parties on a pro rata basis. *See First State Bank, Morton v. Chesshir,* 634 S.W.2d 742, 747 (Tex. App.—Amarillo 1982), writ ref'd n.r.e.).

Under the Rules of Appellate Procedure, this Court "shall make such disposition of costs as the court shall deem proper." Tex. R. App. P. 84. Although the rule does not require pro rata apportioning of costs, we agree with Minter such apportionment in this cause is proper.

The trial-court judgment awarded $22,200 in attorney's fee sanctions; we affirmed $13,200 of the amount but disallowed the $9,000 the trial court made contingent on appeal. We therefore will assess forty percent of the court costs against Minter because his recovery was reduced by approximately forty percent. The remainder will be assessed against Morris's attorneys.

CONCLUSION

Under the undisputed facts as disclosed by the record, the trial court was correct in holding as a matter of law that there was an absence of a genuine issue of any material fact and that Minter was entitled to summary judgment. Accordingly, in cause number 3-92-250-CV, we affirm the summary judgment.

In cause number 3-92-382-CV, we reform the trial-court order to delete the imposition of sanctions against Morris and the award to Minter of $9,000 in attorney's fees contingent upon appellants' unsuccessful appeal. As reformed, we affirm the trial-court judgment in cause number 3-92-382-CV.

John Powers, Justice

[Before Justices Powers, Aboussie and B. A. Smith]

Affirmed as to cause No. 3-92-250-CV; Reformed and, as Reformed, Affirmed as to Cause No. 3-92-382-CV

Filed: August 25, 1993

[Do Not Publish]

APPENDIX B

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS

AT AUSTIN

JUDGMENT RENDERED AUGUST 25, 1993

NO. 3-92-382-CV

MARGIE MORRIS AND TOM L. RAGLAND
V
ALAN H. MINTER
APPEAL FROM 147TH DISTRICT COURT
OF TRAVIS COUNTY BEFORE
JUSTICES POWERS, ABOUSSIE AND B. A. SMITH
REFORMED AND, AS REFORMED, AFFIRMED
ON MOTION FOR REHEARING
OPINION BY JUSTICE POWERS

THIS DAY came on to be submitted the motion for rehearing en banc of appellant Tom Ragland and the motion for rehearing of appellee Alan H. Minter, and the Court having considered same and being of the opinion that appellant's motion for rehearing en banc should be overruled, that appellee's motion for rehearing should be overruled in part and granted in part, and that there was error in the trial court's order, but that such error does not require that the order be reversed: IT IS THEREFORE considered, adjudged, and ordered, that appellant's motion for rehearing

en banc be and is hereby overruled, that the portion of appellee's motion for rehearing concerning the taxing of costs on appeal be and is hereby granted, that the remainder of appellee's motion for rehearing be and is hereby overruled; that the opinion and judgment in this cause, dated July 7, 1993, be and are hereby withdrawn; and that the order of the trial court be and is hereby reformed to delete the imposition of sanctions against Margie Morris and the award to Alan H. Minter of $9,000 in attorney's fees contingent upon appellants' unsuccessful appeal in accordance with the opinion of this Court. As so reformed herein, the order of the trial court is affirmed. It is FURTHER ordered that the appellant Tom L. Ragland, as principal and Merchants Bonding Company (Mutual), as surety on the cost bond on appeal herein, pay sixty percent of the costs of this appeal, both in this Court and the court below; that appellee Alan H. Minter pay forty percent of the costs of this appeal, both in this Court and the court below, and that this decision be certified below for observance.

APPENDIX C

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

RECEIVED
MAR 10 1994

March 9, 1994

Mr. Jack N. Price
410 Congress Avenue
Second Floor
Austin, TX 78701

Mr. William R. Allensworth
Haynes & Boone
600 Congress Avenue
1600 One American Center
Austin, TX 78701

Mr. Matthew J. Sullivan
Haynes & Boone
1600 One American Center
600 Congress Avenue
Austin, TX 78701

RE: Case No. D-4540

Style: TOM L. RAGLAND
v. ALAN MINTER

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin

Blanca Morin, Deputy

APPENDIX D

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

RECEIVED
APR 7 1994

April 6, 1994

Mr. Jack N. Price
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Mr. Matthew J. Sullivan
Haynes & Boone
1600 One American Center
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Austin, TX 78701

RE: Case No. D-4540

Style: TOM L. RAGLAND
v. ALAN MINTER
No. 03-92-00382-CV in the Third Court of Appeals

Dear Counsel:

Today, the Supreme Court of Texas overruled peti-

titioner's motion for rehearing of application for writ of error in the above referenced case. Respondent's conditional motion for rehearing is dismissed. The petition to order court of appeals' opinion published pursuant to Rule 90(c). Texas Rules of Appellate Procedure, is denied.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/ Peggy Littlefield

Peggy Littlefield,
Chief Deputy Clerk

cc: Mr. W. Kenneth Law, Clerk